

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.2312 OF 2023**

**MANGALABAI SANTOSH SHIVNEKAR AND ANOTHER
VERSUS
BHAGWAT SHANKAR SHUKLA**

**AND
WRIT PETITION NO.2394 OF 2023**

**MANGALABAI SANTOSH SHIVNEKAR AND ANOTHER
VERSUS
BHAGWAT SHANKAR SHUKLA**

...

Mr. V. D. Salunke h/f Mr. Surendra V. Suryawanshi, Advocate for
the Petitioners.

...

**CORAM : SHARMILA U. DESHMUKH, J.
DATED : 27th FEBRUARY, 2023.**

PER COURT:-

1. Heard.
2. By the impugned order dated 27.01.2023 the Appellate Court in Regular Civil Appeal Nos.03/2023 and 04/2023 has allowed the application below Exhibit-5 and stayed the judgment and decree passed in the Regular Civil Suit No.82/2016 till the hearing of the Appeal.
3. The petitioners are the original defendants and respondent is original plaintiff in RCS No.82/2016. The suit was for the permanent injunction in which the petitioners preferred a counter claim for permanent injunction and possession. For the sake of convenience the parties are referred to by their status before the Trial Court.

4. The plaintiff claimed right in the suit property on the ground that the predecessors were the protected tenants of the property. The defendants appeared and opposed the relief and filed their counter claim. It was denied by the defendants that the suit property was in possession of the plaintiffs as protected tenants. It is the case of the defendants that they became owners and in possession of the suit property by virtue of sale deeds dated 07.02.2015 and 18.02.2015. In the proceedings, an application below Exhibit-6 was preferred by the plaintiff for temporary injunction and below Exhibit-21 by the defendants for temporary injunction. Both these applications came to be rejected. As against which the Miscellaneous Civil Appeals came to be filed by both the parties. In the appeals, the application of the defendants came to be rejected and the application of the plaintiff came to be allowed. These orders were carried forward to this Court by virtue of Writ Petition No.7754/2017 and Writ Petition No.7755/2017. This Court dismissed both the writ petitions on 04.07.2017 and as such, an injunction was in favour of the plaintiff restraining the defendants or any one claiming or obstructing them from the possession of the plaintiff till the final hearing and disposal of the suit. It was the case of the defendants that taking advantage of the orders passed by this Court in the writ petitions, on 05.07.2017 the defendants were dispossessed and forcible possession was taken by the plaintiff. As such, an application for amendment was filed by the defendants and the counter claim was amended to seek recovery of possession. By the judgment and decree dated 02.04.2022, the RCS No.82/2016 was dismissed and the counter claim of the defendants was partly allowed. The plaintiff was restrained from causing obstruction to the possession of the defendants over the counter claim property.

5. Regular Civil Appeal No.03/2023 was preferred by the plaintiff in which an application was moved below Exhibit-5 seeking a stay to the judgment and decree passed in RCS No.82/2016, which came to be allowed.

6. Heard the learned counsel appearing for the petitioners.

7. Learned counsel appearing for the petitioners submits that the grant of the stay by the Appellate Court amounts to protecting the illegal possession of the plaintiff over the suit property. He would further contend that the Trial Court has observed that the possession of the property was with the defendants at the time of the institution of the suit and as such, the forcible dispossession subsequently cannot be construed as lawful possession. He would further submit that pursuant to the orders passed in writ petitions there has been forcible dispossession and as such, an application for amendment came to be filed. In support of his contention that the illegal possession of the plaintiff cannot be protected he relied upon the decision of the Apex Court in case of ***Premji Ratansey Shah and Others Vs. Union of India and Others***, reported in ***(1994) 5 SCC 547***.

8. Considered the submissions.

9. For present this Court is concerned with the validity of the order dated 27.01.2023 passed by the Appellate Court staying the judgment and decree passed in RCS No.82/2016 dated 02.01.2023. It is the case of the petitioners that they have been dispossessed on 05.07.2017 and as such, the counter claim was amended to seek recovery of possession. The Trial Court while

dismissing the suit has partly allowed the counter claim of the defendants and restrained the plaintiff from causing obstruction to the possession of the defendants. The Trial Court has on the basis of the order dated 04.07.2017 passed by this Court in the writ petitions considered the directions given in paragraph nos.20 to 23 and has held that there is no observation in respect of the fact that the plaintiff has taken possession of the suit property on 04.07.2017 and also that there is no observation that defendant no.1 was dispossessed on 05.07.2017 and as such, has held that the amendment made in the counter claim by virtue of order dated 04.07.2017 passed by this Court in respect of the plaintiff taking possession of the suit property is of no use.

10. It is the difficult to comprehend as to how the said finding can be arrived at by the Trial Court in view of the specific case of the petitioners themselves that on 05.07.2017 the petitioners had been dispossessed by the respondents and subsequent to which an amendment was sought to the counter claim for recovery of possession. In event, the Trial Court was of the opinion that there was a forcible dispossession and the petitioner were the lawful possessors of the property the decree in the counter claim should have provided for handing over the possession of the property to the Petitioners which has not been done in the present case. The Appellate Court after considering the amendment which has been made to the counter claim has rightly observed that the amendment *prima facie* reveals that the defendants have admitted the plaintiff's possession over the suit property though not lawful.

11. Considering the above, the impugned order of 27.01.2023 in my opinion cannot be faulted with. By the order dated 27.01.2023 there has been a stay to the judgment and decree till the hearing of the appeal.

12. In my opinion, there is no clarity on the stand of the petitioners in as much as after once claiming that he has been dispossessed on 05.07.2017, without any decree in his favour for recovery of possession it is not clear as to how the possession can as of date said to be with the petitioners. Considering that the decree is the subject matter of appeal, it is justifiable if the proceedings are stayed in as much as the appeal may be rendered infructuous. As regards the decision which has been relied upon by the learned counsel for the petitioners in case of ***Premji Ratansey Shah and Others*** (supra), the Apex Court has held that the possession is of the wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession as against the owner. In the present case the Respondents claimed to be the protected tenant and in possession of the property. The facts of the present case are distinguishable from the facts of the case of the ***Premji Ratansey Shah and Others*** (supra) where the Apex Court has considered the issue of injunction vis-a-vis a trespasser.

13. As regards the decision in the case of the ***Maria Margarida Sequeria Fernandes and Ors Vs. Erasmo Jack de Sequeria (Dead) through L.Rs.***, reported in ***AIR 2012 SC 1727*** the issue in the case was as regards the possession of the care taker and in view of the facts of that case the principle of law as regards the possession of a caretaker, servant or any person

who was allowed to live in the premises for some time was being considered. In my opinion the decisions relied upon by the petitioners do not assist the case of the petitioners. At the interim stage an order of stay has been granted in order to maintain status quo in respect of the property, which cannot be faulted with.

14. For the reasons above, there is no infirmity in the order of the Appellate Court. The final decision as regards the merits of the case will be rendered after considering the entire evidence on record and the stay of the proceedings cannot be implied as a stay to the unlawful possession particularly when the Trial Court has not given any finding as regards the possession of the parties. For the reasons above, writ petitions are devoid of merits and stand dismissed.

15. Considering that the petitioners claimed that the possession was forcibly taken away during the pendency of the proceeding, the Appellate Court is requested to decide the Regular Civil Appeals expeditiously.

(SHARMILA U. DESHMUKH)
JUDGE